

Relationship between Courts and Competition Authorities: A View from the UK

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This talk considers 3 areas of relationship between courts and competition authorities.

- How do UK courts scrutinise decisions of competition authorities?
- How do UK courts apply findings of competition authorities?
- What is the interplay between domestic UK courts & competition authorities and EU courts & competition authorities?

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Firstly, an overview...

- Meaning of “*Competition Authorities*”
- Meaning of “*Courts*”
- The legislative and regulatory framework governing the relationship between the two

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Key Competition Authorities

- Competition and Markets Authority (CMA)
 - Result of merger between OFT and Competition Commission
 - Main domestic competition authority
- Concurrent powers along with a number of sectoral regulators:
 - Ofcom; Ofgem; Ofwat, ORR, NIAUR, CAA, Monitor (NHS Improvement), PSR; FCA
 - Enforcement powers rarely used by sectoral regulators
- However, only CMA can issue guidance on penalties and commitments, and make procedural rules (after consulting the others).

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Concurrency Regime in Practice

- Governed by Concurrency Regulations (SI 2014/536)
- Information-sharing
- Case allocation
- Support on casework
- UKCN
 - Coordinated efforts on case decisions, leniency and remedies
 - Case decision working group
- Secondments

Source: CMA Annual Report on Concurrency, April 2018

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Key Courts: Overview

- Competition Appeal Tribunal
 - In its own words: “a specialist court designed to be able to scrutinise the detail of regulatory decisions in a **profound** and **rigorous** manner” (*Hutchison 3G v OFCOM* [2008] CAT 11)
- High Court
 - Parallel jurisdiction in certain aspects (e.g., civil damages for competition breaches)
 - Exclusive jurisdiction in certain aspects (e.g., judicial review of sectoral regulators)
- Ordinary civil claims raising “competition issues” can be transferred to CAT from High Court: ***Agents Mutual Ltd v Gascoigne Halman Ltd*** [2017] CAT 15

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CAT in Practice

- 3-person tribunals: typical tribunal has 1 lawyer and 2 'ordinary members' who are experts in various fields
 - Some are former members of competition authorities - e.g., Peter Freeman QC, former head of Competition Commission
- Flexible procedure specifically designed to deal with competition claims
 - Fast-track procedure suited for smaller claims
 - Collective proceedings: novel statutory regime (see, e.g., *Merricks v MasterCard Inc.* [2017] CAT 16)
- Appeals to the Court of Appeal (in England & Wales)

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CAT: Varied Workload

	2017/18	2016/17	2015/16
Appeals, applications and claims received of which:	4	29	11
section 46 Competition Act 1998 ¹	1	8	0
section 47 Competition Act 1998 ²	0	0	0
section 47A Competition Act 1998 ³	1	12	6
section 47B Competition Act 1998 ⁴	0	2	0
section 120 Enterprise Act 2002 ⁵	0	2	1
section 179 Enterprise Act 2002 ⁶	0	0	0
section 192 Communication Act 2003 ⁷	2	4	3
section 317 Communications Act 2003 ⁸	0	0	1
section 49B Competition Act 2003	0		
applications for interim relief ⁹	0	1	0
Applications to intervene	1	35	9
Case management conferences held	8	20	4
Hearings held (sitting days):	7(37)	18(66)	3(25)
Judgments handed down of which:	27	32	13
Judgments disposing of main issue or issues	7	5	3
Judgments on procedural and interlocutory matters	8	20	6
Judgments on ancillary matters (e.g. costs)	12	7	4
Orders made	52	105	52

Source: CAT Annual Report 2017-2018

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Legislative and Regulatory Framework

- **Competition Act 1998**
 - Starting point for all modern competition actions (together with TFEU Articles 101 & 102)
- **Enterprise Act 2002**
 - Reviews of decisions re mergers and market investigations
- **Specific / sectoral acts**
 - E.g., Communications Act 2003; Postal Services Act 201
- **Enterprise and Regulatory Reform Act 2013**
 - Governs concurrency regime
- **Consumer Rights Act 2015**
 - Allows stand-alone damages actions (by amending EA 2002)

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Question 1: How do UK courts scrutinise decisions of competition authorities?

- **Three questions within this question:**
 - What is the applicable gateway for CAT jurisdiction?
 - What standard of review does the applicable gateway require CAT to adopt?
 - What powers does CAT have after exercising its review?

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Gateways for CAT Jurisdiction

- Appeals on the merits in respect of decisions
 - under competition rules found in Article 101 and Article 102 TFEU / Chapters I and II of Competition Act 1998
 - imposing penalties pursuant to ss.114 or 176(1) of EA 2002
 - applying relevant provisions of Communications Act 2003

- Applications for review
 - Decision to accept or release commitments under s. 31A of Competition Act 1998: *Skyscanner v CMA* [2014] CAT 16
 - Merger and market investigation decisions under EA 2002
 - Determination concerning price control under Communications Act 2003

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CAT Standard of Review

- Appeal on merits
 - Full review by reference to the grounds set out in the notice
 - CAT may admit or exclude evidence, including that not originally available to respondent

- Application for review
 - *“same principles as would be applied by a court on an application for judicial review”*
 - Illegality, irrationality, procedural impropriety
 - Most frequent: irrationality
 - ***BAA v Competition Commission*** [2012] CAT 3 at para 20

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CAT Powers

- Appeal on merits
 - Confirm, set aside or remit any part of decision: *Flynn & Pfizer v CMA* [2018] CAT 11
 - Impose, revoke or vary the amount of a penalty
 - Give any directions or make any decision which the regulator could have made: *VIP Communications Limited v Ofcom* [2007] CAT 3

- Appeal for review
 - Dismiss appeal or quash whole or part of underlying decision
 - If quashed, remit with a direction to reconsider in accordance with ruling

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Question 2: How do UK courts apply findings of competition authorities?

- Final decisions on infringements binding on CAT/HC:
 - Commission finding of infringement of EU competition law
 - CMA (or other UK sectoral regulator) finding of infringement of EU and/or UK competition law
 - Previous CAT finding of infringement of EU and/or UK competition law in relation to an appeal from an infringement decision by the CMA (or sectoral regulator)

- Findings of fact by CMA binding on parties:
 - Time for appealing the finding has expired; or
 - Finding has been confirmed on appeal by CAT

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Question 3: What is the interplay between UK & EU courts and competition authorities?

- Modernisation Regulation and the European Competition Network
 - Ability of EU commission or any competition authority to intervene in proceedings
 - Model leniency programme
 - Proposed new Directive to empower competition authorities

- Reference from UK Courts to Europe
 - Requests for information from Commission
 - Requests for preliminary ruling under Article 267 TFEU: *Generics (UK) Ltd v CMA* [2018] CAT 4 (Paroxetine case)

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Finally, a friendly warning...

- All of what we have discussed so far is based on the current law of England & Wales.
- A potentially seismic change in the form of Brexit is around the corner.
- Don't be surprised if rules governing competition authorities change radically by the time of the 2nd UCL South Asian Competition Law Conference...

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Thank you.

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